

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

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| Alfalfa Electric Cooperative, Inc., | Docket Nos. EL04-18-000 |
| Choctaw Electric Cooperative, Inc., and | EC04-18-000 |
| People's Electric Cooperative | |

ORDER DISCLAIMING JURISDICTION AND AUTHORIZING DISPOSITION OF
JURISDICTIONAL FACILITIES

(Issued December 19, 2003)

1. In this order, we authorize the disposition of jurisdictional facilities and grant a petition for a declaratory order regarding the jurisdictional status of certain entities. We find that certain passive participants are not, as a result of their participation in a lease and leaseback transaction, subject to the Commission's jurisdiction under Section 201 of the Federal Power Act (FPA).¹ We also find that the proposed lease and leaseback transaction is in the public interest because it will not adversely affect competition, rates or regulation.

I. Background

2. On November 12, 2003, Alfalfa Electric Cooperative, Inc. (Alfalfa Electric), Choctaw Electric Cooperative, Inc. (Choctaw Electric), and People's Electric Cooperative (People's Electric) (collectively, Cooperatives or Applicants) filed an application pursuant to Section 203 of the FPA requesting Commission authorization for the lease and leaseback of certain transmission and wholesale distribution facilities (Jurisdictional Facilities). Applicants also requested that the Commission disclaim jurisdiction under Section 201 of the FPA over the passive investors, including owner lessors, owner participants, and managers or owner trustees (collectively, Passive Participants) in the proposed lease and leaseback transaction.

3. Alfalfa Electric and People's Electric are public-utility rural electric cooperatives located in the state of Oklahoma. Choctaw Electric sells and distributes electric power to retail customers, but does not engage in any wholesale sales or transmission. The

¹ 16 U.S.C. § 824 (2000).

Cooperatives are members of Western Farmers Electric Cooperative (WFEC), a generation and transmission cooperative. The Cooperatives purchase all of their electricity requirements from WFEC. Alfalfa Electric has wholesale sales contracts with the City of Burlington, Oklahoma and the City of Kiowa, Kansas. People's Electric provides wholesale transmission service to wholesale customers: Byng Public Works Authority and Chickasaw Tribal Utility Authority. Choctaw Electric does not engage in any wholesale sales or transmission.

4. According to the application, Passive Participants are not engaged in utility operations or regulated as public utilities by the Commission under the FPA. However, Applicants state that one or more Passive Participants may be a non-regulated affiliate of a public utility.

II. The Proposed Transaction

5. Each of the Cooperatives proposes to enter into a separate lease and leaseback transaction with one or more special purpose business trusts or limited liability companies (Owner Lessor) of the Cooperatives' ownership interests in certain transmission facilities (Leased Property). Only the Cooperatives' physical property will be subject to the leases, not the wholesale sales and transmission agreements of Alfalfa Electric and People's Electric.

6. According to the application, each Cooperative will enter into a long-term lease (Head Lease) of an undivided interest in the Leased Property with each Owner Lessor. Concurrent with the execution and deliverance of the Head Lease, a leaseback (Facility Lease) will also be executed and delivered that will lease the same Leased Property back to each Cooperative for a term shorter than the term of the Head Lease. Each Owner Lessor will finance the acquisition of its undivided interest in the proposed transaction through a combination of equity contributions and non-recourse loans. The Facility Lease will be a conventional "net" lease under which the Cooperatives will incur the obligation to operate, maintain and insure the Leased Property. Applicants state that legal title to the Leased Property will remain with the Cooperatives for the term of the Facility Lease.

III. Notice and Interventions

7. Notice of Applicants' filing was published in the Federal Register, 68 Fed. Reg. 66,405 (2003), with comments, protests, and interventions due on or before December 3, 2003. None were filed.

IV. Discussion

A. Disposition of Jurisdictional Facilities

8. Section 203(a) of the FPA provides that the Commission must approve a proposed disposition if it finds that the disposition “will be consistent with the public interest.”² The Commission generally takes account of three factors in analyzing proposed dispositions of facilities: (a) the effect on competition; (b) the effect on rates; and (c) the effect on regulation.³

9. Applicants state that the proposed transaction is consistent with the public interest and will not have an adverse effect on competition, rates, or regulation. With respect to competition, Applicants state that the lease and leaseback of the Jurisdictional Facilities will effectuate no change in the ownership or control of either the Leased Property or the Jurisdictional Facilities. With respect to rates, Applicants state that People’s Electric’s and Alfalfa Electric’s jurisdictional rates will not be affected by the proposed transaction. With respect to regulation, Applicants state that the proposed lease and leaseback of the Jurisdictional Facilities will not effectuate any change in either federal or state regulatory authority over the Jurisdictional Facilities.

10. For these reasons, and in the absence of any opposition to the transaction, we find that the proposed transaction will not have an adverse effect on competition, rates, or regulation and is consistent with the public interest.

B. Disclaimer of Jurisdiction

11. Applicants request a disclaimer of jurisdiction over the Passive Participants, i.e., a determination that they will not be regarded as “public utilities” as defined in Section 201 of the FPA. The question presented by the petition is whether, as a result of their involvement in the transaction, the Passive Participants will own or operate facilities

² 16 U.S.C. § 824b(a) (2000).

³ See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (December 30, 1996), FERC Stats. and Regs., Regulations Preambles January 1991-June 1996 & 31,044 (1996), order on reconsideration, Order No. 592-A, 62 Fed. Reg. 33,342 (June 19, 1997), 79 FERC & 61,321 (1997); see also Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, 65 Fed. Reg. 70,983 (November 28, 2000), FERC Stats. and Regs., Regulations Preambles July 1996-December 2000 & 31,111 (2000), order on reh'g, Order No 642-A, 66 Fed. Reg. 16,121 (March 23, 2001), 94 FERC & 61,289 (2001).

subject to the Commission's jurisdiction, thereby making them public utilities under Section 201 of the FPA.

12. Section 201(b) of the FPA states:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy

13. Section 201(e) of the FPA states that:

The term "public utility" . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part

14. The applicability of these sections to passive owner-lessors of jurisdictional facilities has been addressed by the Commission on numerous occasions. In Pacific Power & Light Company,⁴ the Commission established a two-step analysis for determining whether holding a financial interest in jurisdictional facilities constitutes ownership resulting in public utility status under the FPA. Under that analysis, we must first determine if the Passive Participants will operate the facilities. Applicants represent that the Passive Participants will not operate the Leased Property or have any decision-making authority with respect to the Leased Property. Second, we must be assured that a Passive Participant is not in the business of selling electric power. Applicants state that the Passive Participants will not be engaged in the business of producing, selling, or transmitting electric power.⁵

15. Accordingly, we find that the Passive Participants will not become public utilities subject to the Commission's jurisdiction under Section 201 of the FPA as a result of the proposed transaction. Therefore, we will disclaim jurisdiction over the Passive Participants.

⁴ See Pacific Power & Light Company, 3 FERC ¶ 61,119 (1978). See also El Paso Electric Company, 36 FERC ¶ 61,055 (1986); City of Vidalia, Louisiana, 52 FERC ¶ 61,199 (1990); Oglethorpe Power Corporation, 77 FERC ¶ 61,334 (1996).

⁵ If this changes so that the Passive Participants operate the facility in order to make sales of electric energy at wholesale or to engage in transmission in interstate commerce, they will become public utilities and will be required to make the appropriate filings pursuant to Section 205 of the FPA, 16 U.S.C. § 824d (2000). See, e.g., Unicom Investments, Inc., 91 FERC ¶ 61,109 at 61,387 n.9 (2000).

The Commission orders:

(A) Applicants' petition for declaratory order is hereby granted, as discussed in the body of this order.

(B) The proposed disposition of jurisdictional facilities is hereby authorized, as discussed in the body of this order.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of cost, or any other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation or property claimed or asserted.

(E) The Commission retains authority under Section 203(b) and 309 of the FPA to issue further orders as appropriate.

(F) Applicants shall promptly notify the Commission of the date on which the disposition of jurisdictional facilities is consummated.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.